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Attorneys for Defendants K-M Industries
 Holding Co. Inc.; K-M Industries Holding Co.
 Inc. ESOP Plan Committee; and CIG ESOP
 Plan Committee

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

THOMAS FERNANDEZ, LORA SMITH
 and TOSHA THOMAS, individually and on
 behalf of a class of all others similarly
 situated,

Plaintiffs,

v.

K-M INDUSTRIES HOLDING CO., INC.,
et al.,

Defendants.

) Case No. C06-07339 CW
)
) **DECLARATION OF HENRY I.**
) **BORNSTEIN IN SUPPORT OF**
) **MOTION FOR SUMMARY**
) **JUDGMENT BY DEFENDANTS**
) **K-M INDUSTRIES HOLDING**
) **CO., INC., K-M INDUSTRIES**
) **HOLDING CO. INC. ESOP PLAN**
) **COMMITTEE AND CIG ESOP**
) **PLAN COMMITTEE**
)
) Hearing Date: July 31, 2008
) Hearing Time: 2:00 p.m.
) Courtroom: 2, 4th Floor
) Judge: Hon. Claudia Wilken
)

I, Henry I. Bornstein, hereby declare:

1. I am an attorney duly admitted to practice law in the State of California and in this federal district. I have personal knowledge of the facts stated herein, and if called as a witness, I would and could testify with respect thereto.

2. I am Of Counsel to the law firm of Lovitt & Hannan, Inc., counsel for Defendants K-M Industries Holding Co., Inc.; K-M Industries Holding Co. Inc. ESOP Plan Committee and CIG ESOP Plan Committee.

3. I submit this Declaration in support of the concurrently-filed Motion for Summary Judgment by defendants K-M Industries Holding Co., Inc., K-M Industries Holding Co., Inc. ESOP Plan Committee and CIG ESOP Plan Committee.

4. Attached hereto as Exhibit 1 is a true and correct copy of testimony from the Deposition of Herbert R. Giffins, March 28, 2008.

5. Attached hereto as Exhibit 2 is a true and correct copy of testimony from the Deposition of Joseph Cristiano, April 8, 2008.

6. Attached hereto as Exhibit 3 is a true and correct copy of testimony from the Deposition of Thomas Fernandez, April 21, 2008.

7. Attached hereto as Exhibit 4 is a true and correct copy of testimony from the Deposition of Lora Smith, April 16, 2008.

8. Attached hereto as Exhibit 5 is a true and correct copy of the Deposition of Tosha Thomas, April 18, 2008.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed at San Francisco, California this 25th day of June 2008.


Henry I. Bornstein

HERBERT R. GIFFINS

March 28, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO AND OAKLAND DIVISION

THOMAS FERNANDEZ, et al.,)
)
Plaintiffs,)
) Case No.
vs.)
) C-06-07339 CW
K-M INDUSTRIES HOLDING CO., INC., et al.,)
)
Defendants.)
)
)
)

VIDEOTAPED DEPOSITION OF HERBERT R. GIFFINS
March 28, 2008
Oakland, California

Reported by:
EMI ALBRIGHT
RPR, CSR No. 13042
Job No. 79127

CERTIFIED
COPY

HERBERT R. GIFFINS

March 28, 2008

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO AND OAKLAND DIVISION
4

5
6 THOMAS FERNANDEZ, et al.,

7 Plaintiffs,

8 vs.

9 K-M INDUSTRIES HOLDING CO., INC., et al.,

10 Defendants.
11
12

13
14
15 VIDEOTAPED DEPOSITION OF HERBERT R. GIFFINS, taken
16 on behalf of Plaintiffs, at 1330 Broadway, Suite 1800,
17 Oakland, California, beginning at 9:11 a.m. and ending at
18 3:43 p.m., on March 28, 2008, before me, EMI ALBRIGHT, RPR,
19 CSR No. 13042.
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21
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25

HERBERT R. GIFFINS

March 28, 2008

1 A It was very obvious that going through the
2 documents that soon -- as soon as there was a concern or
3 appeared to be a concern about asbestos in the OSHA
4 publication, that the company and Mr. Moore took a very
10:05 5 positive step to do something to assure that the
6 employees, the people working in the factory as well as
7 the customers, that everything was done to protect their
8 health and wellbeing and to follow up with what OSHA
9 required to be followed up with immediately. And that's
10:05 10 to me was the key point of the documents I'm talking
11 about.

12 BY MS. SCOTT:

13 Q Do you know when -- now, let me clarify.
14 Let me make sure I understand. Who was PACO? What was
10:05 15 the PACO company?

16 MS. SMITH: Object to form.

17 A Okay. 1968 Mr. Moore purchased the company
18 that was in Richmond, California, by the name of PACO.
19 And they manufactured drywall type materials like seam
10:06 20 fillers and that type of thing. And Mr. Moore bought
21 the company in '68 and continued to run -- the company
22 was run as a subsidiary of the company, as a separate
23 division, and continued to manufacture drywall type
24 products, which seam sealers, patching compounds, that
10:06 25 type of thing.

HERBERT R. GIFFINS

March 28, 2008

1 BY MS. SCOTT:

2 Q And these are -- some of these materials --
3 some of the products that were produced by PACO
4 contained asbestos; is that right?

10:06 5 MR. SULLIVAN: Object to form.

6 A At the time all the products contained
7 asbestos.

8 BY MS. SCOTT:

9 Q Do you know when -- do you know when PACO
10:07 10 stopped producing materials that had asbestos in it?

11 MS. SMITH: Object to the form.

12 A '74 -- wait a minute. Hold on one second.
13 About '81, I think.

14 BY MS. SCOTT:

10:07 15 Q And how do you know this? What is your
16 basis for knowledge about this?

17 A Again going through the documents. And I
18 have not looked at them for a while so again I am a
19 little fuzzy. When you retire and you worry about
10:07 20 grandchild's baseball games, you also forget some of
21 this stuff.

22 Q Did you ever communicate with any attorneys
23 who wanted documents from the asbestos repository?

24 MS. SMITH: Object to form.

10:07 25 MR. BORNSTEIN: Object to form.

1 STATE OF CALIFORNIA)

2 : ss)

3 County of Alameda)

4
5 I, the undersigned, a Certified Shorthand Reporter
6 of the State of California, do hereby certify: That the
7 foregoing proceedings were taken before me at the time and
8 place herein set forth; that any witnesses in the foregoing
9 proceedings, prior to testifying, were placed under oath;
10 that a verbatim record of the proceedings was made by me
11 using machine shorthand which was thereafter transcribed
12 under my direction; further, that the foregoing is an
13 accurate transcription thereof.

14 I further certify that I am not a relative,
15 employee, attorney or counsel of any party to this action or
16 relative or employee of any such attorney or counsel and that
17 I am not financially interested in the said action or the
18 outcome thereof;

19 IN WITNESS WHEREOF, I have this date subscribed my
20 name.

21 Dated: April 9, 2008

22
23 Emi Albright

24 EMI ALBRIGHT, CSR No. 13042
25

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO AND OAKLAND DIVISION

**CERTIFIED
COPY**

THOMAS FERNANDEZ, et al.,

Plaintiffs,

vs.

K-M INDUSTRIES HOLDING CO., INC., et al.,

Defendants.

)
)
) Case No.

)
) C-06-07339 CW
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VIDEOTAPED DEPOSITION OF JOSEPH CRISTIANO
April 8, 2008
Oakland, California

Reported by:
EMI ALBRIGHT
RPR, CSR No. 13042
Job No. 79129

**CONTAINS SOME
CONFIDENTIAL MATERIAL**

THOMAS FERNANDEZ, et al.,
Plaintiffs,
vs.
K-M INDUSTRIES HOLDING CO., INC., et al.,
Defendants.

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21
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1 BY MS. HASSELMAN:

2 Q Do you know whether it contains any
3 information regarding insurance coverage for Kelly-Moore
4 asbestos litigation?

5 MR. SULLIVAN: Object to the form.

6 A If it had anything to do with asbestos, it
7 would have been in those files.

8 BY MS. HASSELMAN:

9 Q Did you ever put documents into the
10 asbestos repository?

11 A No.

12 Q When did asbestos litigation start to be a
13 problem for Kelly-Moore?

14 MR. LOVITT: Object to the form.

15 MS. SMITH: Object to the form.

16 A It was a minor irritation during the '80s.
17 It was one of those things that when I joined the
18 company, there was no -- there was not even any mention
19 in '84 of any asbestos problem. Later on it, as I
20 already mentioned, it was a nuisance type of thing, \$500
21 claims, \$250 claims. It was, you know, inconsequential.
22 Insurance companies were handling it.

23 And then at some point the insurance
24 companies stopped giving us information. And I already
25 told you about that, and the need to get Cheryl

1 STATE OF CALIFORNIA)
2 : ss)
3 County of Alameda)
4

5 I, the undersigned, a Certified Shorthand Reporter
6 of the State of California, do hereby certify: That the
7 foregoing proceedings were taken before me at the time and
8 place herein set forth; that any witnesses in the foregoing
9 proceedings, prior to testifying, were placed under oath;
10 that a verbatim record of the proceedings was made by me
11 using machine shorthand which was thereafter transcribed
12 under my direction; further, that the foregoing is an
13 accurate transcription thereof.

14 I further certify that I am not a relative,
15 employee, attorney or counsel of any party to this action or
16 relative or employee of any such attorney or counsel and that
17 I am not financially interested in the said action or the
18 outcome thereof;

19 IN WITNESS WHEREOF, I have this date subscribed my
20 name.

21 Dated: APR 18 2008
22

23
24 EMI ALBRIGHT, CSR No. 13042
25

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO AND OAKLAND DIVISION

**CERTIFIED
COPY**

THOMAS FERNANDEZ, et al.,

Plaintiffs,

vs.

K-M INDUSTRIES HOLDING CO., INC., et al.,

Defendants.

)
)
) Case No.

) C-06-07339 CW
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VIDEOTAPED DEPOSITION OF THOMAS FERNANDEZ
April 21, 2008
San Francisco, California

Reported by:
EMI ALBRIGHT
RPR, CSR No. 13042
Job No. 79887

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO AND OAKLAND DIVISION
4

5
6 THOMAS FERNANDEZ, et al.,)

7 Plaintiffs,)

8 vs.)

9 K-M INDUSTRIES HOLDING CO., INC., et al.,)

10 Defendants.)

) Case No.

) C-06-07339 CW
)
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)

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14
15 VIDEOTAPED DEPOSITION OF THOMAS FERNANDEZ, taken on
16 behalf of Defendants, at 900 Front Street, Suite 300, San
17 Francisco, California, beginning at 9:44 a.m. and ending at
18 4:22 p.m., on April 21, 2008, before me, EMI ALBRIGHT, RPR,
19 CSR No. 13042.
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1 had with asbestos litigation?

2 MS. HASSELMAN: Objection. Vague and
3 ambiguous. Calls for a legal conclusion. Also vague as
4 to time.

12:17 5 A I don't remember.

6 BY MR. LOVITT:

7 Q Now, if you look at Exhibit 162, there's a
8 pretty detailed description of asbestos litigation,
9 isn't there?

12:17 10 MS. HASSELMAN: Objection. The document
11 speaks for itself.

12 BY MR. LOVITT:

13 Q Well, take a look at it.

14 A That's correct.

12:17 15 Q Looking at that document, is it your
16 impression that the company, CIG, was trying to conceal
17 its concern about possible adverse impacts on CIG's
18 stock because of the asbestos litigation?

19 MS. HASSELMAN: Objection. Calls for a
12:17 20 legal conclusion. Vague and ambiguous.

21 A No.

22 BY MR. LOVITT:

23 Q Now, if you look at Exhibit 217, was it
24 your impression in the time frame January of '03 that
12:17 25 CIG was trying to conceal the possible negative impact

1 that the asbestos litigation might have on the value of
2 CIG ESOP stock?

3 MS. HASSELMAN: Objection. Calls for a
4 legal conclusion. Vague and ambiguous.

12:18 5 A From reading this, it doesn't appear to be
6 so.

7 BY MR. LOVITT:

8 Q Well, do you have any other reason apart
9 from -- apart from this, being Exhibit 217, has anything
12:18 10 else come to your attention that causes you to believe
11 that the company, CIG, that is, attempted to conceal the
12 concerns that the CIG ESOP stock might be negatively
13 impacted by the asbestos litigation?

14 MS. HASSELMAN: Objection. Calls for a
12:19 15 legal conclusion. Vague and ambiguous.

16 A No.

17 BY MR. LOVITT:

18 Q Did you ever ask anyone at CIG for more
19 information about the possible negative impact that the
12:19 20 asbestos litigation might have on the CIG ESOP stock?

21 A I did not.

22 MR. LOVITT: Very quickly we will put in
23 218.

24 (Exhibit No. 218 marked
25 for identification.)

1 STATE OF CALIFORNIA)

2 : ss)

3 County of Alameda)

4
5 I, the undersigned, a Certified Shorthand Reporter
6 of the State of California, do hereby certify: That the
7 foregoing proceedings were taken before me at the time and
8 place herein set forth; that any witnesses in the foregoing
9 proceedings, prior to testifying, were placed under oath;
10 that a verbatim record of the proceedings was made by me
11 using machine shorthand which was thereafter transcribed
12 under my direction; further, that the foregoing is an
13 accurate transcription thereof.

14 I further certify that I am not a relative,
15 employee, attorney or counsel of any party to this action or
16 relative or employee of any such attorney or counsel and that
17 I am not financially interested in the said action or the
18 outcome thereof;

19 IN WITNESS WHEREOF, I have this date subscribed my
20 name.

21 Dated: APR 29 2008

22
23 Emi Albright
24 EMI ALBRIGHT, CSR No. 13042
25

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

THOMAS FERNANDEZ, et al.,

Plaintiffs,

vs.

No. C 06-07339 CW

K-M INDUSTRIES HOLDING CO.,
INC., et al.,

Defendants.

CERTIFIED
COPY

VIDEOTAPED DEPOSITION OF LORA D. SMITH

San Francisco, California

Wednesday, April 16, 2008

VOLUME 1

Reported by:
TRACY L. PERRY
CSR No. 9577
CHRIS TE SELLE
CSR No. 10836
JOB No. 84325

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 OAKLAND DIVISION

4 THOMAS FERNANDEZ, et al.,

5 Plaintiffs,

6 vs.

No. C 06-07339 CW

7 K-M INDUSTRIES HOLDING CO.,
8 INC., et al.,

9 Defendants.

10
11
12
13
14
15 Videotaped Deposition of LORA D. SMITH, Volume 1,
16 taken on behalf of Defendants, at 900 Front Street,
17 Suite 300, San Francisco, California, beginning at
18 9:31 a.m. and ending at 5:55 p.m., on Wednesday,
19 April 16, 2008, before TRACY L. PERRY, CSR No. 9577,
20 and Chris Te Selle, CSR No. 10836
21
22
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15:51:17 1 and didn't really thoroughly read it.

15:51:21 2 Q. But when you look back at Exhibit 169,
15:51:25 3 170, and 171, would it be, is it your opinion that
15:51:32 4 the company was faithfully and accurately describing
15:51:41 5 the asbestos situation?

15:51:44 6 MS. HASSELMAN: Objection. Calls for a legal
15:51:46 7 conclusion.

15:51:47 8 THE WITNESS: Like I said, I didn't think it
15:51:48 9 was affecting the CIG stock.

15:51:51 10 BY MR. LOVITT:

15:51:52 11 Q. But, as we sit here today, do you feel
15:51:55 12 that the company was on the level with you about the
15:51:58 13 asbestos situation?

15:52:01 14 MS. HASSELMAN: Same objections.

15:52:05 15 THE WITNESS: The way I interpreted it was it
15:52:07 16 was the paint company's issue, not the insurance
15:52:09 17 company's issue. And, like I said, I didn't maybe
15:52:13 18 read it thoroughly. I had a toddler at home.

15:52:16 19 BY MR. LOVITT:

15:52:17 20 Q. Okay.

15:52:17 21 A. You know --

15:52:18 22 Q. That's a fair statement.

15:52:23 23 But, when you look at it, looking at these
15:52:25 24 three documents, is it, is it your current
15:52:30 25 impression that the company was trying to be sneaky

15:52:33 1 and hide something from you?

15:52:35 2 MS. HASSELMAN: Objection. Calls for a legal
15:52:36 3 conclusion. Argumentative.

15:52:39 4 THE WITNESS: No. It's fair to say that.

15:52:42 5 BY MR. LOVITT:

15:52:42 6 Q. Let's take a look at the next exhibit
15:52:45 7 which we will ask the court reporter to mark as 172.

15:52:46 8 (Exhibit Smith 172, confidential
15:52:48 9 document, K-M Industries Holding
15:52:49 10 Company, Inc. employee stock
15:52:49 11 ownership plan, December 31, 2003,
15:52:49 12 for Lora Smith, Bates numbered
15:52:49 13 P 037, marked for identification,
15:52:49 14 as of this date.)

15:53:14 15 MS. HASSELMAN: 172 is another, appears to be
15:53:16 16 another plan statement with some personal data on
15:53:21 17 it.

15:53:22 18 MR. LOVITT: Pass the confidential stamp,
15:53:23 19 please.

15:53:25 20 MS. HASSELMAN: Let's stamp it confidential.

15:53:26 21 Thank you.

15:53:41 22 BY MR. LOVITT:

15:53:42 23 Q. 172 is the K-M Industries Holding Company,
15:53:45 24 Inc. employee stock ownership plan, December 31,
15:53:49 25 2003, for Lora Smith, Bates number P 037.

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby certify:

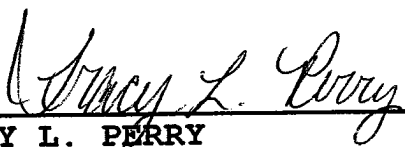
3 That the foregoing proceedings were taken
4 before me at the time and place herein set forth; that
5 any witnesses in the foregoing proceedings, prior to
6 testifying, were duly sworn; that a record of the
7 proceedings was made by me using machine shorthand
8 which was thereafter transcribed under my direction;
9 that the foregoing transcript is a true record of the
10 testimony given.

11 Further, that if the foregoing pertains to
12 the original transcript of a deposition in a Federal
13 Case, before completion of the proceedings, review of
14 the transcript [] was [] was not requested.

15 I further certify I am neither financially
16 interested in the action nor a relative or employee
17 of any attorney or party to this action.

18 IN WITNESS WHEREOF, I have this date
19 subscribed my name.

20
21 Dated: MAY - 1 2008

22
23 
24 TRACY L. PERRY
25 CSR No. 9577

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby certify:

3 That the foregoing proceedings were taken
4 before me at the time and place herein set forth; that
5 any witnesses in the foregoing proceedings, prior to
6 testifying, were duly sworn; that a record of the
7 proceedings was made by me using machine shorthand
8 which was thereafter transcribed under my direction;
9 that the foregoing transcript is a true record of the
10 testimony given.

11 Further, that if the foregoing pertains to
12 the original transcript of a deposition in a Federal
13 Case, before completion of the proceedings, review of
14 the transcript [] was [] was not requested.

15 I further certify I am neither financially
16 interested in the action nor a relative or employee
17 of any attorney or party to this action.

18 IN WITNESS WHEREOF, I have this date
19 subscribed my name.

20
21 Dated: MAY 1 2008

22 

23 _____
24 CHRIS TE SELLE
25 CSR No. 10836

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO AND OAKLAND DIVISION

**CERTIFIED
COPY**

THOMAS FERNANDEZ, et al.,

Plaintiffs,

vs.

K-M INDUSTRIES HOLDING CO., INC., et al.,

Defendants.

)
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) Case No.
) C-06-07339 CW
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)

VIDEOTAPED DEPOSITION OF TOSHA THOMAS
April 18, 2008
San Francisco, California

Reported by:
EMI ALBRIGHT
RPR, CSR No. 13042
Job No. 79885

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO AND OAKLAND DIVISION

THOMAS FERNANDEZ, et al.,)
)
Plaintiffs,)
) Case No.
vs.)
) C-06-07339 CW
K-M INDUSTRIES HOLDING CO., INC., et al.,)
)
Defendants.)
)
)
)

VIDEOTAPED DEPOSITION OF TOSHA THOMAS, taken on
behalf of Defendants, at 900 Front Street, Suite 300, San
Francisco, California, beginning at 9:36 a.m. and ending at
4:55 p.m., on April 18, 2008, before me, EMI ALBRIGHT, RPR,
CSR No. 13042.

1 MS. HASSELMAN: Objection. Vague and
2 ambiguous.

3 A Yes, when requested, yes.

4 BY MR. HANNAN:

15:03 5 Q And would it normally have been your
6 responsibility to see that documents were sent out to
7 the former employees entitled to distributions from the
8 ESOP?

9 MS. HASSELMAN: Objection. Vague and
15:03 10 ambiguous.

11 A Myself and others.

12 BY MR. HANNAN:

13 Q And who are the others?

14 A Lizzy Fernandez, Linda Hazelton.

15:03 15 Q And is it correct you don't know one way or
16 another whether you handled this document or one of them
17 handled it?

18 MS. HASSELMAN: Objection. Excuse me.
19 Objection. Misstates prior testimony. There is no
15:03 20 foundation that she handled this document.

21 A I don't recall seeing this document or
22 whether they handled it or not.

23 BY MR. HANNAN:

24 Q So to the best of your knowledge and
15:04 25 understanding was the HR department doing the best it

1 could to keep former employees informed about matters
2 pertaining to the Kelly-Moore ESOP?

3 MS. HASSELMAN: Objection.

4 A Yes.

15:04 5 MS. HASSELMAN: Calls for speculation.
6 Calls for a legal conclusion.

7 A To the best of my knowledge, yes.

8 MR. HANNAN: Mark as next in order
9 Exhibit 203 what appears to be a copy of a memorandum
15:04 10 from Mr. Giffins to all eligible employees. Bears the
11 production No. KMH 004874.

12 (Exhibit No. 203 marked
13 for identification.)
14

15 BY MR. HANNAN:

16 Q After you have reviewed Exhibit 203, would
17 you identify it for us, please.

18 MS. HASSELMAN: Objection. Calls for
19 speculation. No foundation.

15:05 20 A Yes, I do recall seeing this document.

21 BY MR. HANNAN:

22 Q And tell us what it is.

23 MS. HASSELMAN: Objection. Calls for
24 speculation.

15:05 25 A It's a memo pertaining to the ESOP plan and

1 STATE OF CALIFORNIA)

2 : ss)

3 County of Alameda)

4
5 I, the undersigned, a Certified Shorthand Reporter
6 of the State of California, do hereby certify: That the
7 foregoing proceedings were taken before me at the time and
8 place herein set forth; that any witnesses in the foregoing
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15 employee, attorney or counsel of any party to this action or
16 relative or employee of any such attorney or counsel and that
17 I am not financially interested in the said action or the
18 outcome thereof;

19 IN WITNESS WHEREOF, I have this date subscribed my
20 name.

21 Dated: APR 28 2008

22
23 Emi Albright

24 EMI ALBRIGHT, CSR No. 13042
25